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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 86

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

CIVIL AERONAUTICS BOARD AND NATIONAL AIR-
LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE CIVIL AERONAUTICS BOARD
IN OPPOSITION

OPINIONS BELOW

The court below rendered no opinion other than its judgment and decree of April 23, 1948 (R. 96). The findings and order of the Civil Aeronautics Board (R. 25-30) are not yet reported.

JURISDICTION

The decree of the court below was entered on April 23, 1948 (R. 96). The petition for a writ

of certiorari was filed June 10, 1948. The jurisdiction of this Court is invoked under Section 1006 (f) of the Civil Aeronautics Act of 1938, 49 U. S. C. 646 (f), and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner disclosed a "substantial interest" in the order of the Civil Aeronautics Board which it sought to have reviewed, as required for the judicial review authorized by Section 1006 (a) of the Civil Aeronautics Act of 1938, or showed itself to be a person suffering "legal wrong" or "adversely affected or aggrieved" by such order, within the meaning of Section 10 (a) of the Administrative Procedure Act.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U. S. C. 401 *et seq.*) and of Section 10 (a) of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009 (a)) are set forth in the Appendix, *infra*, pp. 19-20.

STATEMENT

On April 5, 1948, petitioner filed in the court below a petition for review and for a stay of an order issued by the Civil Aeronautics Board on March 29, 1948, allowing a temporary increase in

the rates for the transportation of mail by aircraft by National Airlines, Inc., which will be referred to herein as National. The petition alleged that petitioner is a labor organization having contractual relations with National on behalf of petitioner's pilot members and that its members are engaged in a strike against National (R. 1-2).¹ The only further allegation made concerning petitioner's interest in the order was that one of petitioner's "points" will be that the Board erred in not permitting it to intervene in the proceeding to determine a temporary mail rate for National—

for the reason that petitioner has a "substantial interest" therein within the meaning of the Civil Aeronautics Act (Section 1006 (a)), and is a person "suffering legal wrong" and is "adversely affected or aggrieved" within the meaning of the Administrative Procedure Act (Section 10 (a)) (R. 3).

The Board promptly filed objections to the petition for a stay (R. 5-17) and a motion to dismiss the petition (R. 30). The grounds of the motion to dismiss were (1) that petitioner had not disclosed that "substantial interest" in the order which is requisite to the review authorized by Section 1006 (a) of the Civil Aeronautics Act, and

¹ Petitioner's answer to the Board's motion to dismiss alleges that the pilot members went on strike on February 3, 1948 (R. 35).

(2) that the Board's order is not final and therefore is not subject to judicial review (R. 30). National filed a motion for leave to intervene and a proposed motion to deny a stay and to dismiss the proceeding (R. 31-32, 63-64).

The court below, after hearing argument, entered a judgment dismissing the petition for review "for failure by petitioner to disclose a substantial interest in the order sought to be reviewed" (R. 96). The judgment also granted National's motion for leave to intervene and to file a motion to deny a stay and to dismiss (*ibid.*).

Prior to the Board's temporary rate order which the petitioner is attacking, there were the following proceedings:

On July 14, 1947, National filed a petition with the Board for an increase in its permanent mail rate (R. 68). It later filed a supplemental petition requesting a temporary mail rate and, after this had been denied, it filed on February 2, 1948, a petition for reconsideration alleging new matters (R. 17-18). On February 24, the Board issued an order directing National to show cause why a proposed temporary rate should not be established (R. 18-19). On March 2, petitioner and the International Association of Machinists filed petitions for leave to intervene in this proceeding and also filed objections to the order to show cause (R. 19-20). One such objection was that National's financial need was attributable to its unlawful conduct in its relationship with its em-

ployees and to the resulting strikes (R. 20). The Board on March 5 denied leave to intervene but allowed petitioner and the Association of Machinists to introduce evidence and to cross examine witnesses with respect to the issues which the Board regarded as open in the temporary rate proceeding (R. 23-24).²

Hearing on the proposed temporary rate, which was set for March 8, was twice postponed at the request of petitioner and over the objection of National and public counsel (R. 71). When the hearing was held on March 18 and 19, petitioner and the International Association of Machinists both participated (R. 26).³ The order which the

² The opinion of the Board denying intervention states that the rate proposed in the Board's show cause order "was not intended to reflect any decreases in traffic which were occasioned or may be occasioned by the strikes" of National's employees (R. 23). The Board also said that National's existing mail rate gives it "a lower mail pay yield per revenue plane mile than any other air carrier" (R. 24).

³ Petitioner has implied (Pet. 5) that the evidence upon which the Board relied in fixing a temporary rate was not made available to petitioner. That this was not the case is shown by the Board's order of March 12, 1948, Serial No. E-1284, denying petitions for reconsideration of its order of March 5, 1948, which had denied leave to intervene. The Board in this order, which was not incorporated in the record in this case, made the following findings, among others:

1. The final decision on the temporary rate which may be fixed in this proceeding will be based entirely upon data and material submitted at the hearing or incorporated by reference in the record in this proceeding;
2. Public Counsel has furnished counsel representing

Board entered on March 29, 1948, allowing a temporary increase in the rates for transportation of mail by National, states, among other things, that "the adequacy of National's present mail rate and its operating need have been measured independently of the effects of the current strike of its employees, and the rate established herein is based upon normal operating trends" (*ibid.*).

ARGUMENT

I

Section 1006 (a) of the Civil Aeronautics Act (*infra*, p. 20) provides that a petition for review of an order of the Board may be filed by "any person disclosing a substantial interest in such order." The question here is whether a labor union representing employees of an air carrier has standing to assail an order of the Civil Aeronautics Board granting increased mail pay compensation to the carrier.

A. When judicial review is sought of an order of an administrative agency, the petition for review must set forth facts which, if true, show the peti-

petitioners, the Post Office Department, and National Airlines, Inc., copies of testimony which, together with the material incorporated by reference in the record, will constitute Public Counsel's affirmative case in this proceeding;

3. All basic data and information in the Board's public files which will be incorporated by reference in the record in this proceeding has been and will continue to be available to petitioners;

tioner's standing to maintain its action and a petition which is insufficient in this respect must be dismissed. *Yankee Network v. Federal Communications Commission*, 107 F. 2d 212, 224 (App. D. C.); *Okin v. Securities and Exchange Commission*, 143 F. 2d 943 (C. C. A. 2); *Interstate Electric, Inc. v. Federal Power Commission*, 164 F. 2d 485 (C. C. A. 9). Here, the petition for review (R. 1-5) does not allege any facts showing injury to petitioner by reason of the order sought to be reviewed or that petitioner had any interest, substantial or otherwise, in this order. To allege the legal conclusion that petitioner has a "substantial interest" in the order without alleging any supporting facts, is not sufficient, *Interstate Electric, Inc. v. Federal Power Commission*, *supra*, at p. 486. Moreover, the petition in this case did not even directly allege this legal conclusion. The petition merely states that petitioner would contend that the Board erred in denying it leave to intervene "for the reason" that it had a "substantial interest" in the temporary rate proceeding (*supra*, p. 3).

B. If it be assumed *arguendo* that deficiencies in the petition might be cured by the allegations of petitioner's reply to the motion to dismiss, we find that it is there alleged that the effect of the Board's order is to give financial aid to National's unlawful conduct in its relations with its employees, "thereby directly, substantially and adversely affecting the legal, statutory and property

rights" of these employees (R. 37), but the nature of the alleged injury is not stated. Only in the petition for certiorari is the injury specified. It states (Pet. 8-9) that the effect of the order is that "the power of the government has been injected into an economic contest between a labor organization and an employer, on the side of one contestant," and that "such a strengthening of one side works a weakening of the other, for the outcome of such contests generally depends upon the relative economic strength of the participants."

In fixing rates of compensation for air mail transportation, the Board acts pursuant to Section 406 of the Civil Aeronautics Act. That section alone determines the relevant issues in a mail pay rate proceeding, and the persons who may raise those issues. Admittedly, a Board order fixing air mail compensation does not impose any obligation on petitioner or its members. Such an order does not infringe upon any legal right of petitioner. *Alabama Power Co. v. Ickes*, 302 U. S. 464; *L. Singer & Sons v. Union Pacific R. R. Co.*, 311 U. S. 295. The question remains whether in such a proceeding the Board determines any issues which affect a substantial interest of the petitioner.

Under the Civil Aeronautics Act, the Board determines the rates of compensation for air mail transportation to be paid by the Postmaster General to the air carriers. Section 406 (a) pro-

vides that a proceeding to determine air mail compensation may be commenced by the Board upon its own initiative or upon the petition of the Postmaster General or an air carrier. It is made the Board's duty, after notice and hearing, to determine fair and reasonable rates of compensation. Section 406 (b) specifies the factors to be considered by the Board in determining the rate in each case. The specified factors are the facilities and services required of the carriers for the transportation of mail, the legal standards respecting the character and quality of service to be rendered by the carriers, "and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Although petitioner nowhere has alleged that the carrier has violated the Railway Labor Act or described any such violation, it refers to "compliance by the airline" with that Act as one of the substantive requirements of the Civil Aeronautics Act which the Board has failed to apply in determining temporary mail rates (Pet. 4-5, 7-9). But, even assuming a violation of the Railway Labor Act,

Section 406 (b) does not enumerate compliance with title II of the Railway Labor Act as a factor which must be considered by the Board in fixing air mail compensation. This omission is emphasized by the fact that Section 401 (e) (4) *does provide* that "It shall be a condition upon the holding of a certificate [of public convenience and necessity for one or more routes] by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended." In brief, failure of a carrier to comply with title II of the Railway Labor Act is specifically made a ground for revocation or suspension of its certificate of public convenience pursuant to Section 401 (h). It should be noted that under Section 401 (h) a certificate may not be revoked unless the carrier fails to comply, within a reasonable time to be fixed by the Board, with the provision of the Act which the Board finds to have been violated. See also Section 9 (b) of the Administrative Procedure Act. Nothing in the Act suggests that failure to comply with the Railway Labor Act as such is to be translated from a ground for revocation of certificate into a decisive issue in a proceeding to determine air mail compensation.

Furthermore, nothing in Section 406 suggests that in a proceeding to fix rates of airmail compensation there are any necessary parties other than the Board; the Postmaster General and the

carrier. It is not the purpose of a Section 406 proceeding to do justice to everyone with whom the carrier has relationships. In such a proceeding, whether initiated on its own motion or upon petition of the Postmaster General or the carrier, it is the Board's duty to make a timely determination of the rates which, with non-mail revenues, will enable the carrier under honest, economical, and efficient management, to play its role in the development of air transportation adequate for the commerce of the United States, the Postal Service, and the national defense. There may be various employees, stockholders, creditors, competitors and commercial customers of a particular carrier who would question whether its management is honest, economical or efficient, or who would assert that it is entitled to increased or decreased mail compensation. However, no such person can initiate a mail rate proceeding—that right is limited by Section 406 (a) to the Board, the Postmaster General and the carrier concerned. If, therefore, neither a carrier's employees nor the labor union which represents them can initiate a proceeding to increase or decrease the carrier's rate of compensation for transporting mail, it is difficult to see why the commencement of a proceeding should have the effect of conferring upon petitioner an interest sufficient to give it the status of a party before the Board or to seek judicial review of the Board's action.

C. The Board's order for which petitioner seeks judicial review established *temporary* rates of compensation for the transportation of mail by National. The precise effect of this order and the nature of the considerations underlying its issuance by the Board, make it clear that, whatever petitioner's interest might be in an order establishing permanent rates, it is not a person entitled to obtain judicial review of a Board order establishing temporary rates.

When the Board determines a new rate of pay under Section 406 of the Act, it has normally made the new rate retroactive to the time when the rate proceeding was instituted. If the new rate is higher than the earlier one, there is a retroactive payment to the carrier; if the new rate is lower, there is recoupment from the carrier. The Board's temporary rate procedure arose from a combination of circumstances affecting air transportation during the past two years. Rapidly rising costs, falling load factors, and preparation for prospective traffic in substantial excess of that which materialized, had created a "serious financial condition" in the air transport industry which made it difficult or impossible for carriers to secure funds through sale of stock or borrowing on reasonable terms. Existing mail rates, which in a number of cases were "quite apparently inadequate," were depleting working capital and increasing the need for funds. It was impossible to determine new mail pay rates in

sufficient time to correct the "critical financial emergency" in which many carriers found themselves. The Board therefore established the policy of issuing a rate order in advance of its determination of the final rate, and this temporary rate was fixed at somewhat less than the Board's best estimate of the final rate. All such temporary rates were subject to retroactive adjustment so that in no event would a carrier be permitted to retain more than the amount "ultimately found to be proper upon the fixing of a permanent rate." (R. 21-22.)

In a temporary rate proceeding the only issues which the Board will consider are whether the carrier's "immediate financial position is critical" and whether its existing rate is "substantially inadequate." Injection of other issues into such a proceeding would subject it to all the delays inherent in determination of a final rate and would render the proceeding futile. Issues such as whether the carrier is under "honest, economical, and efficient" management remain open for determination in the proceeding to fix the carrier's new permanent rate. (R. 22-23.)

Inasmuch as the petitioner lacks the interest requisite to entitle it to be made a party to a proceeding under Section 406 to establish permanent rates, or to invoke judicial review of a Board order establishing such rates, it follows that petitioner has even less of an interest in a proceeding to establish temporary rates in which

the issues are sharply limited and in which the Board's action is entirely tentative. The "substantial interest" required by Section 1006 (a) to obtain review requires a showing that the Board's order has a direct adverse effect of a substantial character upon the petitioner, and it is not sufficient to show merely an indirect or speculative effect. *American Power and Light Co. v. Securities and Exchange Commission*, 325 U. S. 385, 388; *American Lecithin Co. v. McNutt*, 155 F. 2d 784, 786 (C. C. A. 2) certiorari denied, 329 U. S. 763.

Petitioner relies upon the statement in *Associated Industries v. Ickes*, 134 F. 2d 694, 704 (C. C. A. 2) that "Congress can constitutionally enact a statute conferring on any non-official person * * * authority to bring a suit to prevent action by an officer in violation of his statutory powers * * * even if the sole purpose is to vindicate the public interest." The short answer is that Congress in the Civil Aeronautics Act did not confer such authority, but expressly confined the right to judicial review of the Board's order to persons who disclose a "substantial interest" in the order for which review is sought. Further guidance as to the intent of Congress is found in a comparison of Section 406 (rates for transportation of mail) with other provisions of the Act. Section 406 refers only to the Postmaster General and to carriers. It is wholly silent as to the participation of other persons, whereas with respect to the Board's

general regulatory powers and duties many provisions of the Act explicitly recognize the interest therein of third persons. Provision is made for notice to interested persons of applications for certificates of public convenience and necessity,⁴ applications for foreign air carrier permits,⁵ applications for approval of consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control;⁶ and public hearing is specifically required with respect to such applications.⁷ "Interested persons" are also given the right to support or protest modifications, amendments, suspensions and revocations of certificates⁸ and permits,⁹ or abandonments of service.¹⁰

Reference has already been made to the Board's power under Section 401 (h) "upon petition or complaint or upon its own initiative, after notice and hearing," to suspend or revoke a certificate of public convenience and necessity for violation of the Act. That subsection further provides that "Any interested person may file with the Board a protest or memorandum in support of or in opposition to the * * * suspension, or revocation of a certificate." The contrast

⁴ Section 401 (b), 49 U. S. C. 481 (b).

⁵ Section 402 (d), 49 U. S. C. 482 (d).

⁶ Section 408 (b), 49 U. S. C. 488 (b).

⁷ Section 401 (c), 49 U. S. C. 481 (c); Section 402 (e), 49 U. S. C. 482 (e); Section 408 (b), 49 U. S. C. 488 (b).

⁸ Section 401 (h), 49 U. S. C. 481 (h).

⁹ Section 402 (g), 49 U. S. C. 482 (g).

¹⁰ Section 401 (k), 49 U. S. C. 481 (k).

between these provisions and those of Section 406, coupled with the fact that Section 401 (e) (4) makes compliance with title II of the Railway Labor Act "a condition upon the holding of a certificate," strongly suggests that Section 401 (h) constitutes the exclusive remedy under the Civil Aeronautics Act for carrier employees asserting violation of the Railway Labor Act. Petitioner has, in fact, invoked such remedy by instituting a complaint, upon which the Board has not yet acted, charging National with failure to comply with the condition prescribed by Section 401 (1) (4). *In the matter of compliance with Section 401 (1) (4) of the Civil Aeronautics Act of 1938 by National Airlines, Inc.*, Docket No. 3298, complaint filed March 25, 1948.

The petitioner also contends that it is entitled to obtain judicial review of the Board's order by reason of Section 10 (a) of the Administrative Procedure Act, which provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Specifically, petitioner asserts that it is a person "suffering legal wrong" because of, and one "adversely affected or aggrieved by", the Board's order. Section 10 (a) was intended to restate existing law in general terms.¹¹ In fact, the

¹¹ Hearings, House Committee on the Judiciary, on Federal Administrative Procedure, 79th Cong., 1st Sess. (1945), p. 38; S. Rep. 752, 79th Cong., 1st Sess. (1945), p. 44.

phrase "any person suffering legal wrong" is used as a limitation, rather than for the purpose of making judicial review available to anyone adversely affected, no matter how indirectly, by governmental action.¹² The Attorney General specifically advised the Senate Committee on the Judiciary that Section 10 (a) as finally enacted was intended to embody the rule of such cases as *Alabama Power Co. v. Ickes, supra.*¹³ Thus, under Section 10 (a), as under Section 1006 (a) of the Civil Aeronautics Act, the right to obtain judicial review of an order of the Board is available only to one who can show injury to a substantial personal interest—an interest protected by law against the type of injury alleged to result from that order. For the reasons previously stated, petitioner has no interest in the Board's action pursuant to Section 406 of the Civil Aeronautics Act which entitles him to judicial review under Section 10 (a) of the Administrative Procedure Act.

II

The court below did not pass upon the contention made by both the Board and National that the petition should be dismissed for the reason that the Board's rate order was only an interim order not

¹² Compare the language of Section 10 (a) as enacted, with the original provision in S. 7, 79th Cong., 1st Sess., as follows: "Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section."

¹³ S. Rep. 752, 79th Cong., 1st Sess., p. 44.

possessing that degree of finality required for purposes of judicial review (R. 13-14, 93). If certiorari should be granted, the respondents would be free to support the judgment of dismissal upon the foregoing ground.¹⁴ We have directed the Court's attention to that contention and to the portion of the record where it is set forth in the event that this Court should wish to consider it in determining whether certiorari should be granted or denied.

CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1948.

¹⁴ *Langnes v. Green*, 282 U. S. 531, 538; *Helvering v. Gowran*, 302 U. S. 238, 245; *LeTulle v. Scofield*, 308 U. S. 415, 421.

APPENDIX

CIVIL AERONAUTICS ACT OF 1938, AS AMENDED¹

SEC. 406. (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith * * * by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; * * *. [49 U. S. C. 486 (a).]

(b) * * * In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air

¹ Act of June 23, 1938, 52 Stat. 973, Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235 (49 U. S. C. 401 *et seq.*).

carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [49 U. S. C. 486 (b).]

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. [49 U. S. C. 646 (a).]

ADMINISTRATIVE PROCEDURE ACT²

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **Right of Review.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. [49 U. S. C. 1009.]

² Act of June 11, 1936, 60 Stat. 237 (5 U. S. C. 1001 *et seq.*).

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